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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 5, 1979.

OPINIONS BELOW

The opinion of the district court (App. B) is reported at 82 Lab. Cas. ¶33,549, and 14 Empl. Prac. Dec. ¶7730 (D.D.C. 1977). The opinion of the court of appeals (App. D) is reported at 606 F.2d 1350 (D.C. Cir. 1979).

JURISDICTION

On August 30, 1979, the court of appeals entered an order (App. E) affirming in part and remanding the record. Northwest filed a timely petition for rehearing on September 13, 1979. On October 5, 1979, the court *sua sponte* vacated (App. F) the August 30 order and entered a judgment (App. G) affirming in part and remanding the case. The petition for rehearing was denied on October 9, 1979 (App. H). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a labor union that violates the Equal Pay Act of 1963, 29 U.S.C. §206(d)(2), by causing an employer to discriminate in wages on the basis of sex is nevertheless immune from the employer's claim for contribution for a portion of the damages assessed.

2(a). Whether an employer has a right to contribution from a labor union that is directly liable to employees for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, for participating in a discriminatory collective bargaining agreement.

(b). If so, whether an employer's claim for contribution based on the union's Title VII liability may be barred because the claim was not asserted at the outset of the action brought by the employees.

STATUTORY PROVISIONS INVOLVED

Set forth in Appendix A are the pertinent provisions of the statutes involved, the Equal Pay Act of 1963, 29 U.S.C. § §206(d), 216(a)-(d), 217, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

STATEMENT

This case presents important questions concerning the liability of labor unions for violations of the federal employment discrimination laws. The respondents, the Transport Workers Union of America ("TWU") and the Air Line Pilots Association ("ALPA"), are labor unions that were certified as the collective bargaining representative of cabin attendants employed by petitioner Northwest Airlines.[1]

A. The Sex Discrimination Suit Brought Against Northwest

This case has its origin in *Laffey v. Northwest Airlines, Inc.*, a large class action brought against Northwest in 1970 by its female cabin attendants.[2] Among the employment

[1]TWU was the authorized representative from 1961 until September 1971. ALPA was the authorized collective bargaining representative of the Northwest cabin attendants from September 1971 through 1976.

[2]The district court issued an opinion finding liability in 1973, *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973). A decree awarding backpay and injunctive relief followed in 1974. 374 F. Supp. 1382 (D.D.C. 1974). The district court's decree was affirmed in part and vacated in part by the court of appeals, 567 F.2d 429 (D.C. Cir. 1976), and this Court denied certiorari, 434 U.S. 1086 (1978). Various aspects of the *Laffey* suit remain pending in the district court and the court of appeals.

practices challenged in *Laffey* was the then-existing wage scale for cabin attendants. Under collective bargaining agreements with the cabin attendants' union, one classification of cabin attendants—pursers—received a higher rank and rate of pay than cabin attendants in the other two classifications—stewardesses and flight service attendants ("FSA's").

The higher pay and rank for pursers under the agreements reflected their supervisory responsibilities over the other cabin attendants. The stewardess and FSA positions were defined as equal in rank and were paid on the same wage scale, lower than that of pursers. Prior to 1967, only men were eligible for promotion to purser. Among the other cabin attendants, men held the title FSA and women held the designation stewardess in equally ranked and equally paid jobs.

The pay differential that formed the basis for the *Laffey* claims had been maintained and preserved through collective bargaining, with the active participation of the cabin attendants' union. The agreements defined the duties of the cabin attendants in each classification, and these descriptions were examined and revised periodically in bargaining. Year after year in contract negotiations, the unions made demands for further increases in the wages of all cabin attendants that preserved or increased the size of the purser wage differential attributed to the extra duties assigned to pursers under the agreements. The unions never suggested reducing or eliminating the differential.

In the *Laffey* suit, the stewardesses attacked the pay differential between the purser and the lower-ranking classifications. They alleged that all Northwest cabin attendants really performed "equal" work and that, by paying stewardesses (as well as male FSA's) less than male

pursers, Northwest was discriminating against stewardesses on the basis of sex. The pay differential was alleged to violate the sex-discrimination provisions both of the Equal Pay Act of 1963 and of Title VII.

A year after the lawsuit was commenced, the *Laffey* plaintiffs moved to join as a party the union that was representing Northwest cabin attendants at the time of the motion, ALPA, in order to effectuate any prospective injunctive relief that might require modifications in the collective bargaining agreement. The plaintiffs, however, refrained from asserting any monetary claims against TWU or its successor, ALPA, which also negotiated one of the contracts later held to be discriminatory. This strategy was not surprising, since the plaintiff class in *Laffey* constituted a majority of the members of the unions and even included members of the union leadership at the time the relevant collective bargaining agreements were negotiated.[3]

After a trial, the district court found that the contractually defined job differences were insufficient to justify the wage differentials agreed upon in collective bargaining by TWU before the suit and by ALPA in the 1972 contract. As a result, the court concluded that the differential constituted sex discrimination in violation of both the Equal Pay Act and Title VII. The district court's decree, later sustained by the court of appeals, awarded back pay to several thousand stewardesses in the amount of the differential. The awards in *Laffey* subject Northwest to a backpay liability that may ultimately reach as much as $50,000,000, making it one of the largest awards—perhaps the largest—ever rendered in an employment discrimination case.

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[3]The stewardesses covered by the plaintiff class had always enjoyed overwhelming numerical superiority in the cabin attendants' unions. The lead *Laffey* plaintiff had been an officer of one union and had participated actively in collective bargaining.

B. Commencement Of The Present Lawsuit.

For procedural reasons, the district court in *Laffey* refused to entertain Northwest's cross-claims and third-party claims against ALPA and TWU in that suit. Northwest then filed the present suit against the unions in 1975, charging them with concurrent responsibility for the contractual pay differential held unlawful in *Laffey*. Northwest sought declaratory relief entitling it to contribution from the unions for their fair share of the *Laffey* backpay award attributable to the purser wage differential that the unions themselves had supported and perpetuated.

C. The District Court's Decision.

With respect to the Equal Pay Act, the district court agreed with the unions' contentions that they have no direct exposure to monetary liability under that Act and, therefore, are not subject to a claim for contribution. The court dismissed that claim.

On the Title VII claim, however, the district court upheld Northwest's position. Since Title VII expressly provides for a damage remedy against unions, the district court recognized that an employer and a union may have concurrent liability and concluded that an employer has a right of contribution against a union for a share of the liability under Title VII:

> "If, as Northwest claims, defendants caused it to discriminate, under a no contribution rule, the entire burden of a judgment of potentially $24,400,000 [the initial estimate of liability without including interest or double damages under the Equal Pay act] will fall on Northwest, while the unions will get off 'scot-free.'

Allowing contribution here will force each party to bear its fair share, and only its fair share, of the loss they have caused the *Laffey* plaintiffs." (App. B, p. 16b).

D. The Cross-Appeals.

The unions obtained a certification pursuant to 28 U.S.C. §1292(b), permitting them to appeal the district court's refusal to dismiss the claim for contribution under Title VII. In order to bring up the Equal Pay Act claim at the same time, Northwest then sought, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the entry of a separate final judgment on the court's order dismissing its claim for contribution under that Act.[4]

The court of appeals invited the EEOC to participate as *amicus curiae.* The EEOC took the position that federal law permits an employer to obtain contribution from a union if both are responsible for a Title VII violation, but argued that an employer's claim for contribution should be barred if not asserted early in the employees' original suit.

E. The Decision of the Court of Appeals.

In the *Laffey* appeal, the court of appeals had stated flatly that a union has monetary exposure under the Equal Pay Act: If a union "contributed to the discriminatory scheme [in violation of the Equal Pay Act], the claimant [employee]

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[4]The district court ordered the entry of final judgment on the Equal Pay Act contribution claim "if the court of appeals chooses to hear the unions' interlocutory appeal. . . ." When the court of appeals accepted the unions' interlocutory appeal, the district court then entered final judgment against Northwest on the Equal Pay Act claim.

has a cause of action against the union as well." *Laffey v. Northwest Airlines, supra,* 567 F.2d at 447.

In *this* case, however, the court below did a complete about face. Unions are not liable to employees, the court concluded, because there is no express provision in the Equal Pay Act permitting employees to sue unions even though the Act expressly forbids unions to cause discriminatory wage levels. That omission, the court of appeals concluded, "insulates unions from suits by employees." (App. D, p. 9d). Accordingly, the court held, there could be no contribution claim by an employer (App. D, p. 12d), and it affirmed the final judgment dismissing Northwest's Equal Pay Act claim.

When it turned to Northwest's claim for contribution for Title VII liability, the court of appeals did another about face. It declined to address any of the issues that it had specially ordered the parties (and enlisted the EEOC) to brief when it allowed the interlocutory appeal. Without questioning the district court's certification under 28 U.S.C. §1292(b) or its own acceptance of the unions' appeal, the court of appeals nevertheless ignored the question certified. Instead, the court remanded the case to allow the district court to consider a "laches" issue that, as the court acknowledged, the unions had raised for the first time on appeal. (App. D, p. 12d).

As a result of the muddled action taken below, the Title VII contribution claim is now in limbo. Further proceedings will be necessary on a claim whose legal sufficiency is in doubt while the district court and the parties explore novel ideas for procedural obstacles to the claim. Meanwhile, Northwest's Equal Pay Act contribution claim stands dismissed, despite the fact that the district court entered final judgment on that claim only to complement appellate review

of the Title VII issue, an issue that the court of appeals ultimately declined to address. Unless review is granted now, the Rule 54(b) judgment dismissing the Equal Pay Act claim may become final and unreviewable at any later stage of these proceedings.

REASONS FOR GRANTING THE WRIT

I.

WHETHER A UNION THAT VIOLATES THE EQUAL PAY ACT IS INSULATED FROM MONETARY LIABILITY IS A QUESTION OF GREAT IMPORTANCE ON WHICH THE CIRCUITS ARE IN CONFLICT AND WHICH THE COURT BELOW DECIDED IN A MANNER CONTRARY TO THIS COURT'S RECENT DECISIONS ON IMPLIED RIGHTS OF ACTION.

A. The Issue Is Of Great Importance To The Public And Private Enforcement Of The Equal Pay Act.

In denying the existence of an employer's claim for contribution against a union, the court below relied exclusively on its conclusion that a union does not have any direct monetary liability to the employees for the damages it causes them in violation of the Equal Pay Act. That premise highlights the importance of this case. The result below is inconsistent with cases imposing monetary liability on unions for violating the Equal Pay Act and it frustrates the remedial purposes of the Act.

The Equal Pay Act of 1963, which is a part of the Fair

Labor Standards Act ("FLSA"), prohibits wage discrimination on the basis of sex. The Act prohibits discrimination both by employers and by unions. 29 U.S.C. §206(d)(1) provides that:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work. . . ."

Section 206(d)(2) imposes a related prohibition upon unions:

> "No labor organization, or its agents, representing employees . . . shall cause or attempt to cause . . . an employer to discriminate against an employee in violation of paragraph (1) . . . ."

Ever since the Labor Department first issued regulations under the Equal Pay Act, the Department has emphasized that unions bear equal responsibilities under the Act. It is the Labor Department's position that Section 206(d)(2) manifests

> "the legislative intent that in situations where wage rates are governed by collective bargaining agreements, *unions* representing the employees shall *share with the employer the responsibility for ensuring* that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions." 29 C.F.R. §800.106 (1979) (emphasis added).

Before the Equal Pay Act was added in 1963, the FLSA was exclusively minimum wage and maximum hour legislation. It already contained provisions imposing monetary liability for violations. For example, 29 U.S.C. §216(b) provides that an employer is liable to employees for "unpaid

minimum wages" or "unpaid overtime compensation. . . ." Under Sections 216(c) and 217 the Secretary of Labor is authorized to sue to recover unpaid minimum wages or overtime compensation due any employee. A recovery of back compensation by the Secretary is ultimately made available to the employees. *See, e.g., Mitchell v. DeMario Jewelry,* 361 U.S. 288 (1960); *Hodgson v. Wheaton Glass Co.,* 446 F.2d 527 (3d Cir. 1971); *Mitchell v. Riley,* 296 F.2d 614 (5th Cir. 1961).

When the Equal Pay act was added to the FLSA, Congress had to provide for administration and enforcement of the new anti-discrimination provisions. It did so by providing in Section 206(d)(3) that an unlawful, sex-based wage differential would be deemed to give rise to a claim for "unpaid minimum wages or unpaid overtime compensation. . . ." This approach allowed Congress to make applicable to Equal Pay Act violations the express liabilities and remedies provided in the FLSA without actually rewriting those provisions.

Against this backdrop the Secretary of Labor has not hesitated to assert that union violations of the Equal Pay Act give rise to monetary liability, even though Congress did not amend the FLSA expressly to provide for monetary liability of unions. His position has been sustained in the federal courts.

For example, in *Hodgson v. Sagner, Inc.,* 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam on opinion below,* 462 F.2d 180 (4th Cir. 1972)—a case relied upon by the court of appeals in *Laffey* when it approved the principle of union liability, 567 F.2d at 447 n.112—the Secretary sued both the employer and the union, alleging violations of the Equal Pay Act and seeking backpay from both defendants. Although the union argued that it was insulated from

liability, the court rejected that position:

> "There is no apparent reason why a union which violates Section 206(d) should be treated any differently from an employer violator. Equitably, both should be subject to the same type of decree, which in order to give full relief would necessarily include a provision requiring the payment of wages illegally withheld or caused to be withheld. . . ." 326 F. Supp. at 373.

In an apparent effort to mask the significance of the decision below, the court of appeals purported not to decide "definitely" (App. D, p. 10d) whether a union has monetary liability in a suit brought by disadvantaged employees. Nevertheless, the court stated that it is "improbable that an employee would ever have an implied cause of action under the Equal Pay Act against his union" and that the possible existence of this implied right was "remote." (App. D, pp. 9d-10d).

But if a union may be liable to the Secretary of Labor for money damages that the Secretary then pays over to the injured employees, there is no reason to think that Congress intended that, when employees sue directly, the union should escape liability entirely and that an employer should bear the full financial loss. If the court below was correct in denying an employer a right to contribution because Congress purportedly did not intend to "create liability on the part of the union for the benefit of employees" (App. D, p. 10), that same rationale would bar the Secretary from pursuing backpay liability on their behalf.

Authoritative resolution of the question of union liability is of great importance to the administration of the Equal Pay Act and will have significant economic consequences. Since enactment of the Equal Pay Act, the Secretary of Labor has pursued thousands of investigations and lawsuits on behalf of over 272,000 employees, resulting in recoveries in excess

of $163 million. *See* U.S. Department of Labor, *Report to Congress: Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* 35 (1979). Yet the decision below that unions are insulated from monetary liability under the Equal Pay Act casts considerable doubt over the government's authority to pursue backpay awards on behalf of employees.

As the *Laffey* case illustrates, there are also many private lawsuits filed under the Equal Pay Act. Enforcement of the Equal Pay Act depends critically on private suits. The decision below, however, blocks the imposition of monetary liability on unions, whether in suits by the employees directly affected or in contribution actions by employers. The decision enables unions to escape the financial consequences of their own discriminatory acts, even though their conduct is expressly outlawed by the Act.

In sum, employees, employers, unions and federal enforcement authorities all need to know whether unions are subject to monetary liability when they violate their duties under the Equal Pay Act.[5]

The existence of a union's backpay liability under the Equal Pay Act is important even if it is subsequently determined that an employer may obtain contribution against a union for Title VII liability. Although both the Equal Pay Act and Title VII prohibit unions from causing sex-based wage discrimination, the Equal Pay Act affords

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[5]This is a particularly opportune time for the Court to address the issue whether labor unions enjoy some special immunity. Governmental enforcement authority for the Equal Pay Act was recently transferred from the Secretary of Labor to the EEOC. *See* Reorganization Plan No. 1 of 1978, §1, 43 Fed. Reg. 19807 (1978). As a new agency takes over enforcement of this statute, the important question of union monetary liability should be clarified for it as well as for the interested parties in the private sector.

several procedural and substantive advantages to injured employees that may increase their recovery. These advantages include a more favorable statute of limitations (*compare* 29 U.S.C. §255(a) *with* 42 U.S.C. §2000e-5(g)) and a unique provision for double damages (29 U.S.C. §216(b)). In addition, full backpay under the Equal Pay Act is automatic, but under Title VII a court has discretion to reduce the amount of backpay awarded or to deny backpay entirely. *See Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 718-23 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Finally, the Equal Pay Act, 29 U.S.C. §206(d)(1), provides for computing backpay under an upward equalization formula that does not apply to a Title VII claim. This may allow Equal Pay Act claimants "more than their due" under Title VII standards. *See Los Angeles Department of Water and Power v. Manhart, supra*, 435 U.S. at 720 n.36. Thus, employees have special incentives to pursue sex-discrimination claims under the Equal Pay Act as "private attorneys general," supplementing governmental enforcement. *Cf. Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978); *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 415; *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). The decision below insulating unions from liability skews all Equal Pay Act enforcement toward employers alone.

It is obviously important whether employees may hold unions accountable for violating their obligations under the Equal Pay Act. The therapeutic impact of this liability would make itself felt where, for example, the discriminating union has been ousted or where an international union that was involved in negotiating a discriminatory contract has greater financial resources than the small employer. From

the employers' standpoint, the issue of union liability for contribution under the Equal Pay Act is of special importance when a court awards double ("liquidated") damages, as the *Laffey* plaintiffs have demanded.

B. The Circuits Are In Conflict On The Issue.

The decision below will have enormous impact upon employers who are unlucky enough to become embroiled in Equal Pay Act litigation in a circuit that does not recognize contribution. Other courts, however, have found this result unjust and inconsistent with the statutory obligations imposed on unions by the Equal Pay Act.

As recognized in *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 893-94 (3d Cir. 1977)—the only other appellate decision in accord with the decision below—there is a split of authority on the issue. The decision below is in conflict with that of the Fourth Circuit in *Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180, 181 (4th Cir. 1972), which adopted the district court's opinion in *Hodgson v. Sagner*, discussed above, and upheld its action "in imposing such liability upon the Union." *See also Wirtz v. Hayes Industries*, 1 Empl. Prac. Dec. ¶9874 (N.D. Ohio 1968) (indicating that contribution may be allowed).

The holding below also conflicts with the rule established for the Fifth Circuit in *Sinyard v. Foote and Davies Division of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978). There employees sued both their employer and their unions alleging violations of both Title VII and the Equal Pay Act. The Fifth Circuit stated unambigously:

> "[L]abor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII *and the Equal Pay Act.* International unions, along

with regional and local unions, may incur liability for discriminatory effects of contract provisions found in collective bargaining agreements." 577 F.2d at 945 (emphasis added).

With the circuits thus in disarray about the existence of union liability under the Equal Pay Act, the decision below exonerating the unions from direct or indirect financial responsibility provides a compelling occasion to introduce some consistency into this important field.

C. The Decision Below Fails To Examine Congressional Intent As Required By Prior Decisions Of This Court.

On a number of occasions in recent Terms, this Court has undertaken to determine when private rights of action should be implied under federal statutes. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis,* No. 77-1645 (November 13, 1979) (48 U.S.L.W. 4001, 4002), and cases cited there. The question is "whether Congress intended to create the private remedy asserted;" that intent "may appear implicitly in the language or structure of the statute or in the circumstances of its enactment." *Id.*, 48 U.S.L.W. at 4002, 4003. The decision below reaches the wrong result on an important issue of federal law after failing to pursue the necessary inquiry.

Although the decision below was nominally based upon congressional intent, the court of appeals relied entirely upon the absence of any *explicit* reference to unions in the remedial provisions of the FLSA, 29 U.S.C. §§216, 217. This approach is flatly inconsistent with this Court's recent decisions that the absence of an explicit claim in favor of private parties is not dispositive; rather, a thorough examination of the relevant legislative history is crucial. For

example, only last Term in *Cannon v. University of Chicago,* No. 77-926 (May 14, 1979) (47 U.S.L.W. 4549), the Court, after carefully examining the legislative history, concluded that there is an implicit basis for holding educational institutions liable in damages to students injured by violations of Title IX of the Civil Rights Act of 1964.

Like Title IX, the Equal Pay Act imposes an unequivocal obligation on employers and unions alike for the special benefit of a protected class—here, the employees. As with Title IX, congressional debates on the Equal Pay Act amply demonstrate an intent that unions bear full and equal responsibility for Equal Pay Act violations and that employers be permitted to enforce that responsibility.[6]

Although Congress did not rewrite the remedial provisions of the FLSA to provide explicitly for backpay actions against unions in Equal Pay Act cases, it is understandable why no specific provision for unions was made. Congress was merging Equal Pay Act enforcement into the general scheme of FLSA remedies. Those preexisting remedial provisions addressed only suits against employers, since, when the FLSA was initially passed, the Act imposed duties only on employers. But when the Equal Pay Act was added to the FLSA in 1963, imposing explicit

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[6]For example, the chairman of the House subcommittee that drafted the measure passed by Congress expressed the congressional intention that unions be subject to damage suits at the instance of employees or employers:

> "Mr. Chairman, I might emphasize that where there is a charge of discrimination, no action can be taken by the Secretary if that discrimination persists, except following an action initiated by him, or it could be initiated by the employee *or the employer* in a Federal district court."

109 Cong. Rec. 9197 (1963) (remarks of Rep. Thompson) (emphasis added).

statutory obligations on unions for the first time, Congress assumed and intended that unions would be subject to the same sanctions for statutory violations as are employers. The prohibition against union-caused discrimination was not to be purely precatory.[7]

As this Court remarked in *Cannon*, "not only the words and history" of the statute, but also "its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." 47 U.S.L.W. at 4557. The decision below, departing so dramatically from the analysis approved by this Court in *Cannon*, should receive plenary review.

II.

THE EXISTENCE OF UNCERTAINTY ON IMPORTANT QUESTIONS RELATING TO ENFORCEMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAW WARRANTS REVIEW OF THE TITLE VII CONTRIBUTION ISSUES.

The court below chose to sidestep an important issue of federal law, one that is crucial to the proper assessment and

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[7]Note the following statement made during an exchange between Rep. O'Hara of Michigan and Rep. Goodell of New York, the bill's principal sponsor:

> "It is my understanding, as it is the understanding of the gentleman from New York [Rep. Goodell] that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act."

109 Cong. Rec. 9209 (1963) (remarks of Rep. O'Hara) (emphasis added).

See also 29 C.F.R. §800.106 (unions "share with the employer the responsibility for ensuring" that no discriminatory wage rates are paid).

allocation of liability under Title VII, and one that has never been decided by this Court. That issue is whether a union may be liable for contribution to an employer who must pay backpay for violations of Title VII founded on the provisions of a collective bargaining agreement. In bypassing that question, the court below framed a related issue: whether an employer's contribution rights are barred if they are not asserted before the initial adjudication of the employer's liability in the suit brought by the employees.

These issues are ripe for decision by this Court. The Title VII question is a clear-cut and extremely important issue of federal law that should be considered and decided at the same time as the analogous issue under the Equal Pay Act.[8] With the Equal Pay Act issue the subject of a final judgment and unquestionably ripe for review, it makes little sense to fragment this case by severing and deferring the cognate issues under Title VII. Moreover, the Title VII issues have independent significance meriting prompt review because, unlike the Equal Pay Act, Title VII covers not only employment discrimination claims based on sex but also those founded on race, color, and religion.

A. There Is Lingering Conflict Over The Important Question Whether There Can Be Contribution For Title VII Liability.

There should be little doubt that a federal common law right to contribution exists in favor of employers against unions that have caused violations of Title VII or otherwise

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[8] *Cf. United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949).

actively participated in them, especially violations that are rooted in the provisions of freely negotiated collective bargaining agreements. The accepted principles of contribution require only two elements: (1) that tortfeasors have common liability to the injured party, and (2) that the party seeking contribution would otherwise pay more than its fair share. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); W. Prosser, *Law of Torts* §50 (4th ed. 1971). Northwest's claim for contribution under Title VII satisfies both elements.

Section 703(c)(3) of Title VII, 42 U.S.C. §2000e-2(c)(3), expressly forbids unions to "cause an employer to discriminate." Not leaving a remedy to implication as under the Equal Pay Act, Section 706(g) specifically provides that backpay shall be "payable by the employer . . . or *labor organization*, as the case may be, responsible for the unlawful employment practice." 42 U.S.C. §2000e-5(g). Indeed, in *Albemarle Paper Co. v. Moody, supra*, this Court noted that "the reasonably certain prospect of a back pay award" would act as a "spur or catalyst" to cause "employers *and unions*" to eliminate discrimination. 422 U.S. at 417-418 (emphasis added).

As a consequence, an "extensive and consistent line of authority" in the lower federal courts establishes that a union may be liable with an employer for discrimination caused in whole or in part by a collective bargaining agreement, and that the concurrent culpability "requires the union to share any back pay liability. . . ." *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 560 (1976).[9]

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[9] *See, e.g., Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978); *Myers v. Gillman Paper Corp.*, 544 F.2d 837 (5th Cir.), *vacated and remanded on other grounds on rehearing*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801 (1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257(4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

Given common backpay liability under Title VII, there is no reason why the general rule of contribution should not apply between employers and unions. Permitting contribution under these circumstances enhances the statutory goal, reflected in Sections 703(c)(3) and 706(g), that a union should shoulder some of the cost of monetary relief to the extent that it is responsible for a Title VII violation. Both the district court below and the EEOC agreed that federal law should recognize this right to contribution.[10]

The crucial question presented by this case has far-reaching ramifications, but it has never been settled by this Court. While most federal courts faced with the question have held that a right of contribution exists under Title VII,[11]

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[10]Despite the unions' arguments below, the decision by the plaintiff employees in *Laffey* not to name the unions in the charges they filed with the EEOC or to join them as defendants in the *Laffey* suit should not bar a claim for contribution. The legislative history of Title VII makes clear that its procedures were not intended to foreclose or cut off rights against "third parties" such as unions. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

As the EEOC pointed out below, the procedural requirements of Title VII do not apply to a separate claim for contribution in which a named employer asserts an equitable claim for reimbursement from an unnamed but concurrently responsible union.

[11]*See, e.g., Parson v. Kaiser Aluminum & Chemical Corp., supra; Stevenson v. International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977); *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Torockio v. Chamberlain Manufacturing Co.*, 51 F.R.D. 517 (W.D. Pa. 1970); *Bowe v. Colgate Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *modified on other grounds*, 416 F.2d 711 (7th Cir. 1969).

several courts have gone the other way.[12] Moreover, in struggling to avoid reaching the Title VII issue, the court of appeals in this case termed this a "complex and sensitive question. . . ." (App. D., p. 12). The absence of definitive guidance from this Court, therefore, has created significant uncertainty about the existence and contours of a contribution claim based on concurrent employer/union liability under Title VII.

This important issue surely merits the Court's attention. More than 5,000 employment discrimination suits are filed *each year* in the federal courts. *See* Administrative Office of the U.S. Courts, *1979 Annual Report of the Director,* Table 30 at 71 (1979). Many hundreds of millions of dollars of liability have been assessed against employers in suits of this type, and more will be claimed from employers in the future. Thus, a huge volume of cases and an enormous amount of liability will turn on whether a "fair share" of the financial liability deliberately imposed on unions by Congress under Title VII may be allocated to those unions that cause or participate in discrimination but are not sued directly.

Perhaps more importantly, a determination whether an employer has a contribution claim against a union will undoubtedly have a substantial impact on the zeal with which unions police their own houses, press for the elimination of discriminatory provisions in contracts, and pressure employers to eradicate discrimination. As the Fifth Circuit noted in *Myers v. Gilman Paper Corp., supra:*

"Being jointly responsible for the creation and

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[12] *E.g., Glus v. G.C. Murphy Co.,* 562 F.2d 880 (3d Cir. 1977) (finding no jurisdiction over contribution claim where employees had not named union in EEOC charge); *Younger v. Glamorgan Pipe & Foundry Co.,* 418 F. Supp. 743, 796-97 (W.D. Va. 1976), *vacated and remanded on other grounds,* 561 F.2d 563 (4th Cir. 1977); *Harden v. Illinois Bell Telephone Co.,* No. 74 C 1505 (N.D. Ill. 1975).

> maintenance of this system, [the unions] had an affirmative obligation to seek Title VII compliance. Had one of the unions, for example, forcefully brought Title VII's requirements to the company's attention and the other unions' attention, that might have provided the necessary stimulus for some or all of the other joint wrongdoers to end the violations." 544 F.2d at 851-52.

That observation has pointed relevance in this case where ALPA and TWU repeatedly pressed to preserve and enlarge the purser pay differential later held to be discriminatory.

B. Whether A Title VII Contribution Claim Is Barred If Not Asserted In The Original Proceeding Is A Question Of Great Importance To The Administration Of Federal Employment Discrimination Law.

The second aspect of the Title VII issue—whether an employer's contribution claim may be barred if it was not asserted early in the original Title VII action brought against the employer—is also worthy of consideration by this Court. The EEOC took the position as *amicus curiae* below that, while an employer does have a Title VII contribution claim, the claim must be asserted as soon as the employer is sued by the employees. The court of appeals remanded the case for general exploration of the "laches" issue, thereby implicitly accepting the proposition that there may be such a procedural bar to a Title VII contribution claim. The readiness of the EEOC to urge and the court below to accept such a quasi-legislative rule—found nowhere in Title VII or in the law of contribution as this Court has previously applied it, *see Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra*—underscores the need for review by this Court.

A requirement of this sort is contrary to basic principles of the law of contribution and would lead to unjust results. The general rule is that a right to contribution does not arise until one of several wrongdoers has paid more than his fair share. Indeed, the traditional rule was that a contribution claim could not even be asserted until after the underlying action had terminated and the judgment had been paid. *See* W. Prosser, *Law of Torts* §50 at 309 & n.80 (4th ed. 1971); Restatement (Second), *Torts* §886A(2) (1979). Federal practice, of course, now permits early, even hypothetical assertion of contribution claims by way of impleader or cross-claim, but the Federal Rules do not require immediate assertion of the contingent claim. 3 J. Moore, *Federal Practice* ¶14.03[3] at 14-158, ¶14.06 (1979).

Thus, in light of the long-standing, uniform rule governing contribution, Northwest's commencement of this action—after its Title VII liability had been determined at the trial level but even before the decision on its appeal and before payment of the judgment—can hardly be found unreasonably tardy. Inexcusable delay, however, is an essential element of "laches." *Costello v. United States,* 365 U.S. 265, 282 (1961); *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1256 (5th Cir. 1979).[13] As *amicus* below, the EEOC nevertheless suggested an ironclad rule requiring the employer to assert a contribution claim as soon as the employer is sued by the employee. It would be patently improper, however, for the courts to create a forfeiture of a contribution claim simply because the claim was not asserted as soon as the underlying charge of discrimination was levelled.

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[13]Actual prejudice is the other element. *See Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 424.

Any rule requiring immediate assertion of Title VII contribution claims would have important consequences for the administration and enforcement of Title VII. If employees bring their Title VII claims against the employer only, the employer would be forced, as a protective measure, to hale the union into court as well, even before any determination that a provision in the collective bargaining agreement violated Title VII. The compulsory addition of third-party defendants would make Title VII litigation needlessly more complex as a matter of course. Not only is the EEOC's proposed requirement unfounded in the structure of Title VII, it is also squarely at odds with Rule 14(a) of the Federal Rules of Civil Procedure, which provides that third-party claims are permissive, not mandatory.

The obvious importance of any special "laches" rule in Title VII cases argues strongly for intervention by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1980.

APPENDIX A

Pertinent Statutory Provisions

Equal Pay Act:

29 U.S.C. §206(d)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any

amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Fair Labor Standards Act:

29 U.S.C. §211(a)

. . . Except as provided in section 212 of this title [pertaining to child labor], the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

29 U.S.C. §216

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the

case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or 207 of

this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employees to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

* * *

29 U.S.C. §217

The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

Title VII, Civil Rights Act of 1964:

Section 701, 42 U.S.C. §2000e

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

* * *

Section 703, 42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individiual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization—

(a) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, seregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

Section 706, 42 U.S.C. §2000e-5

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has

occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * *

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred . . . .

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period or reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary com-

pliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved . . . .

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter . . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liablity shall not accrue from a date more than two years prior to the filing of a charge with the Commission . . . .

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION	)	
OF AMERICA,	)	
AFL-CIO and AIR LINE PILOTS	)	
ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

MEMORANDUM

By this action, plaintiff Northwest Airlines, Inc. ("Northwest") seeks a declaratory judgment that it is entitled to reimbursement from defendant unions, Transport Workers Union of America, AFL-CIO ("TWU"), and Air Line Pilots Association, International ("ALPA"), for some portion of the monetary judgment issued against it in *Laffey v. Northwest Airlines, Inc.*[1] In *Laffey,* Northwest was found

[1] 366 F. Supp. 763 (D.D.C. 1973), *affirmed,* ____ F.2d ____ , 13 F.E.P. Cases 1068 (D. C. Cir. 1976).

to have violated the Equal Pay Act[2] and Title VII of the Civil Rights Act of 1964,[3] by, *inter alia,* maintaining unwarranted salary differentials between male flight attendants or pursers, and the plaintiffs, two classes of female flight attendants,[4] and was held liable for back pay under Title VII and under the Equal Pay Act. These salary provisions were contained in collective bargaining agreements entered into by Northwest and the unions representing the flight attendants, which during the period involved in *Laffey* were defendants TWU and ALPA.[5]

Northwest sought, belatedly, to assert the claims involved in the instant action in the *Laffey* litigation by filing post-judgment motions for leave to serve a third-party complaint on TWU and to amend its answer to assert claims against ALPA, which had participated in the *Laffey* litigation as a "non-aligned party." When these motions were denied, Northwest brought the present action. Northwest's theory here is that because of defendants' participation in the collective bargaining agreement underlying the *Laffey* judgment, it is entitled to reimbursement for some portion of the monetary judgment issued against it in *Laffey* from defendants. With respect to its monetary liability arising under the Equal Pay Act, Northwest claims it is entitled to reimbursement on the ground that it has an implied cause of

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[2]29 U.S.C. §206(d)(1) (1970).

[3]42 U.S.C. §2000e-2(a) (1970) (hereinafter "Title VII").

[4]One class was composed of female cabin attendants under the Equal Pay Act, and the second class was composed of female cabin attendants under Title VII. These classes were neither coextensive nor mutually inclusive.

[5]TWU was replaced as collective bargaining representative of Northwest's cabin attendants and pursers in September, 1971 by ALPA.

action against defendant unions under the Act for causing it to discriminate or, alternatively, on a theory of a right to contribution under the federal common law. With respect to its monetary liability arising under Title VII, Northwest bases its claim for reimbursement solely on the federal common law right to contribution.

This action is presently before the Court on defendants' motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction.[6] Defendants contend that neither the Equal Pay Act nor Title VII afford Northwest an express or implied right to contribution for the monetary liability imposed on Northwest under these Acts and that Northwest has no federal common law right to contribution here. Defendants further contend that this Court lacks jurisdiction over certain of plaintiff's claims and that certain jurisdictional prerequisites to this action have not been met. For the reasons set forth below, the Court is of the opinion that it has jurisdiction over this matter, that Northwest's claim of entitlement to reimbursement for some portion of the monetary liability imposed under Title VII should not be dismissed and that Northwest's claim of entitlement to reimbursement for some portion of the monetary liability imposed under the Equal Pay Act must be dismissed.

THE EQUAL PAY ACT

The Equal Pay act prohibits employers from discriminating between employees on the basis of sex in the wages paid for equal work.[7] The Act also prohibits labor organi-

[6]By order dated November 11, 1975, this Court denied a prior motion to dismiss or stay this action, based on grounds not presented here, brought by defendant ALPA.

[7]29 U.S.C. §206(d)(1).

zations from causing or attempting to cause employers to discriminate against employees in violation of the Act.[8] Section 216 of Title 29 of the United States Code provides for civil enforcement of the Act. Section 216(b) expressly provides for a private right of action for aggrieved employees against employers,[9] and section 216(c) authorizes civil suits by the Secretary of Labor. There is no express provision for suits by either employees or employers against labor organizations for violations of the Act.[10]

As noted, one ground for Northwest's claim of entitlement to reimbursement for a portion of its monetary liability under the Equal Pay Act is that it has an implied cause of action under the Act against labor organizations which cause it to discriminate against employees in violation of the Act. In the few cases in which the question of whether there is such an implied cause of action under the Act has been addressed, the courts have uniformly held that there is no such implied cause of action. See, *Usery v. Beloit College,* 12 E.P.D. ¶11,203 (W.D. Wisc. 1976); *Brennan v. Emerald Renovators, Inc.,* 410 F. Supp. 1057 (S.D.N.Y. 1975); *Wirtz v. Hayes Industries, Inc.,* 9 F.E.P. Cases 493 (N.D.

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[8]29 U.S.C. §206(d)(2).

[9]Section 216(b) provides in pertinent part that:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

[10]The only person expressly authorized to sue a labor organization is the Secretary of Labor, pursuant to 29 U.S.C. §216(c).

Ohio 1968). This Court must agree with the conclusions of the above courts.

To determine whether a statute affords a plaintiff an implied cause of action, the Court must consider four factors: 1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; 2) whether there is any indication of Congressional intent to create or deny such a cause of action; 3) whether an implied right is consistent with the statutory scheme and 4) whether the implied right is one traditionally relegated to state law. *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926, 947-49 (1977); *Cort v. Ash*, 422 U.S. 66, 78 (1975). Neither the first nor the third factor is present here.

The Equal Pay Act was clearly designed to protect and benefit employees, and not for the special benefit of employers. Employers are the class whose conduct is regulated by the Act to protect employees. In light of the Supreme Court's decision in *Piper v. Chris-Craft Industries, Inc., supra*,[11] this Court is most hesitant to imply a cause of action for Northwest, a member of the class regulated by the Act to protect another class of persons. That the Act prohibits labor organizations from causing or attempting to cause employers to discriminate in violation of the Act does not, as plaintiff suggests, mean that the Act was designed for the especial benefit of employers or alter the status of employers as regulated parties under the Act.

Further, one of the policies underlying the Fair Labor Standards Act, of which the Equal Pay Act is a part, is that:

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[11]In *Piper*, the Court declined to imply a cause of action under the Williams Act in favor of the plaintiff in part because the plaintiff was a member of the class whose conduct was regulated by the Act to protect another class of persons. *Id.* at 947.

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (3) constitutes an unfair method of competition in commerce; . . . .[12]

By forcing employers to disgorge back pay discriminatorily withheld from employees, the Act prevents the employer who violates the Act from obtaining an unfair competitive advantage, in terms of salary costs, over employers who abide by the Act. To allow the employer to recover, by virtue of an implied cause of action under the Act, a portion of this back pay from a labor organization would place the discriminating employer in an unfairly advantageous position vis-a-vis employers who comply with the Act, thereby defeating this purpose. *See Brennan v. Emerald Renovators, Inc., supra,* at 1061.

Northwest also claims that it is entitled to contribution from defendants for its monetary liability under the Equal Pay Act under the federal common law right to contribution. Assuming at this point that federal law recognizes such a right,[13] Northwest would not be entitled to any contribution from defendants for its monetary liability under the Equal Pay Act. As Northwest recognizes, an essential prerequisite to any right to contribution, where such a right is recognized, is common liability; that is, both wrongdoers must be liable in common to the plaintiff. With respect to any right to contribution for its monetary liability under the Equal Pay Act, this requires that defendant unions, as well as North-

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[12]29 U.S.C. §202(a)(3).

[13]This question is discussed more fully at pages 10-11 *infra*.

west, must be potentially liable for back pay under the Act to the *Laffey* plaintiffs.

The Equal Pay Act does not, as previously noted, expressly afford aggrieved employees, such as the *Laffey* plaintiffs, any right of action against a labor organization. Northwest urges, however, that aggrieved employees have an implied cause of action under the Act against labor organizations for violations of the Act. This question is governed by the standards enunciated in *Piper v. Chris-Craft Industries, Inc., supra,* and *Cort v. Ash, supra,* set forth above, and the courts which have considered the question have held that an employee does not have such an implied cause of action. *E.g., Cook v. Mountain States T & T Co.,* 12 F.E.P. Cases 979 (D. Ariz. 1975); *Tuma v. American Can Company,* 367 F. Supp. 1178 (D.N.J. 1973).[14] These decisions appear to be correct. While employees are the class of persons for whose benefit the Act was designed, the statutory provisions for civil enforcement and the legislative history suggest that Congress did not intend to create such a right and inferring such a right may well conflict with the purposes of the Act as discussed *supra.*[15] Consequently, since the Act does not expressly or impliedly afford employees, such as the *Laffey* plaintiffs, any right of action against defendant unions, the common liability prerequisite to a right of contribution is not present here.

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[14]In *Hodgson v. Sanger, Inc.,* 326 F. Supp. 371 (D. Md. 1971), *affirmed sub nom., Hodgson v. Baltimore Regional Joint Board,* 462 F.2d 180 (9th Cir. 1972), the court held that the Secretary of Labor could recover back pay wages for employees from a labor organization. Contrary to plaintiff's contention, this does not mean that employees can bring an action against a labor organization or that labor organizations are directly liable to employees under the Act.

[15]See pages 14-15 *supra.*

TITLE VII

Title VII, like the Equal Pay Act, is silent on the question of contribution,[16] and Northwest does not here claim that Title VII expressly or implicitly affords it a right to reimbursement from or a cause of action against TWU and ALPA. Instead, Northwest bases its claim of entitlement to reimbursement for some portion of the monetary judgment awarded under Title VII from defendants solely on its alleged right to contribution under the federal common law.

A. *Jurisdiction.*

At the outset, defendants contend that this Court lacks jurisdiction over this claim for contribution. First, they assert that it is now axiomatic that federal courts do not have general common law jurisdiction. However, Northwest is not asserting here a common law right to contribution based on state law, but rather that it has a federal common law right to contribution. This presents a question of federal law[17] over which this Court has federal question jurisdiction pursuant to 28 U.S.C. §1331[18]

Defendants' second jurisdictional argument is premised upon the requirement of 42 U.S.C. §2000e-5(e) that the person aggrieved by violations of Title VII file a timely

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[16]This question, as well as the question of whether Northwest is entitled to reimbursement for some portion of the monetary liability imposed under the Equal Pay Act, is governed by federal, not state, law. *See generally Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).

[17]See note 16 *supra.*

[18]Even if this Court lacked federal question jurisdiction here, the uncontested allegations in the complaint reveal that the Court has diversity jurisdiction, pursuant to 28 U.S.C. §1332, and plaintiff has alleged such jurisdiction in its complaint.

charge with the Equal Employment Opportunity Commission ("EEOC"). It is now well-established that the filing of a charge with the EEOC is a jurisdictional prerequisite to the bringing of an action under Title VII for violations thereof.[19] Neither the *Laffey* plaintiffs nor Northwest has ever filed an EEOC charge against either ALPA or TWU. Consequently, defendants contend that this Court lacks jurisdiction over Northwest's claims against them.

This contention is not persuasive. Section 2000e-5(e) does not by its own terms apply to this action. A prior EEOC charge is a jurisdictional prerequisite only to an action brought under Title VII. Northwest does not bring this action under Title VII, but rather bases its claim and brings this action under the federal common law. There is no such prerequisite to a federal common law claim. Accordingly, several courts have determined, at least implicitly, that the charging requirement of section 2000e-5(e) is inapplicable to claims for contribution under federal common law theories. See *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *see also Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972).

Defendants stress what they allege to be the inequity of a determination that the requirement of a prior EEOC charge is not applicable here. They point out that if they had been named as codefendants in *Laffey* without a prior EEOC

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[19] *E.g., Williams v. General Foods Corp.*, 492 F.2d 399, 404-05 (7th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 985 (D.C. Cir. 1973); *Stebbins v. Continental Insurance Companies*, 422 F.2d 843, 845 (D.C. Cir. 1971).

charge, they would have been entitled to dismissal and that if Northwest is not required to file a prior EEOC charge, its access to the courts will be faster and easier than that of the victims of discrimination. However, these differences are not due, as defendants suggest, to the status of the plaintiff, but to the nature of the cause of action involved. Simply put, the charging requirement applies by its own terms only to an action brought under Title VII, not to a claim based on the federal common law. Similarly, defendants point out that there has never been any determination that they violated Title VII, so that this would have to be established in this action. Since the victim of discrimination cannot establish a violation of Title VII absent a prior EEOC charge, defendants argue that an employer should not be able to do so. Once again, this difference is due to the nature of the cause of action, not the status of the parties.

B. *The Right to Contribution.*

There are two principle elements of a right to contribution. There must be common liability,[20] and the party seeking contribution must have paid more than its share of the monetary award.[21] As to common liability, this requirement is met here. It is now fairly well-established that a labor organization is liable to employees or prospective employees for discriminatory provisions in collective bargaining agreements to which they were a party. *See, e.g., Myers v. Gilman Paper Corp.,* 544 F.2d 837 (5th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).[22] Several cases have held that employers and unions

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[20]See page 6 *supra.*

[21]See Prosser, *Law of Torts,* §47 (1964 ed.).

[22]In *Laffey v. Northwest Airlines, Inc., supra,* this Circuit stated in dictum that an employee has a cause of action against a union if the union contributed to the discriminatory scheme. 13 F.E.P. Cases, *supra* at 1080.

are jointly and severally liable for back pay awarded under Title VII. *E.g., Evans v. Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974). Whether the second criteria is met, that Northwest has paid more than its share of the monetary judgment, is largely a factual question not at issue here.[23]

The more difficult question is whether there is a right to contribution under federal law. The traditional American rule, originating in the English case of *Merryweather v. Nixon,*[24] was that there was no right to contribution between joint tortfeasors. This rule has been abrogated in most states, principally by statute although a few jurisdictions, including the District of Columbia,[25] have done so by decisional law. As with state law, there was initially no right to contribution under federal law, absent legislation. *Union Stock Yards Co. v. Chicago, B & Q R. Co.,* 196 U.S. 217, 224 (1905). However, the modern trend, as evidenced by cases such as *Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975), has been to recognize a right to contribution under federal law. *Gould v. American-Hawaiian Steamship Company,* 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds,* 535 F.2d 761 (3rd Cir. 1976). The federal courts have come to realize that the policy considerations upon which the

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[23]Judge Robinson has estimated that the amount of the monetary judgment which will be entered against Northwest in *Laffey* will be $24,500,000. *Laffey v. Northwest Airlines, Inc.,* 374 F. Supp. 1382 (D.D.C. 1974). While Northwest has been required to post a supersedeas bond in this amount, it does not appear that the judgment has yet been paid. Further, there has not yet been any determination that ALPA or TWU violated Title VII, which determination, among others, will have to be made before the Court can decide whether or not Northwest paid more than its fair share.

[24]1799,8 Term.Rep. 186, 101 Eng. Rep. 1337.

[25]*Knell v. Feltman,* 174 F.2d 662 (D.C. Cir. 1949).

traditional rule was built are archaic and lead to inequities.[26] Indeed, the most extensive body of law evidencing a significant trend toward fashioning a federal common law right to contribution concerns contribution for back pay awarded under Title VII.

Although there are no cases directly on all fours with the present case,[27] the great majority of cases which have considered the question of a federal common law right to contribution for back pay imposed under Title VII favor Northwest's position. There is now persuasive and ample authority for the proposition that there is a federal common law right to contribution for back pay awarded under Title VII. *See Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Bowe v. Colgate-Palmolive Company*, 272 F. Supp. 332 (S.D. Ind. 1967), *reversed in part on other grounds*, 416 F.2d 711 (7th Cir. 1969); *see also Myers v. Gilman Paper Corp.*, 544 F.2d 837, 860 (5th Cir. 1977); *Electrical Workers (IUE) v. Westinghouse Broadcasting Co., Inc.*, 12 E.P.D. ¶11,273 (W.D.N.Y. 1976).

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[26] *E.g., Kohr v. Allegheny Airlines, Inc., supra*, at 405.

[27] In most of these cases, this question arose in the context of a motion by a union to dismiss a cross-claim or counterclaim for contribution asserted by an employer against a union in an action brought by employees under Title VII. Here, Northwest has brought a separate action for a declaratory judgment as to its right to contribution. These differences are not material, and do not go to the merits of plaintiff's claim for contribution.

The Court is aware of only two cases which have denied claims for contribution for a monetary judgment imposed under Title VII, neither of which is particularly apposite or persuasive. In *Harden v. Illinois Bell Tel. Co.*, No. 74C1505 (N.D. Ill. 1975), the court held that there was no implied cause of action for contribution, slip op. at 2-3, but did not consider the question of whether there is a federal common law right to contribution. In *Younger v. Glamorgan Paper & Foundry Company,* 418 F. Supp. 743 (W.D. Va. 1976), the court held that there was no federal common law right to contribution because, since *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1937), there is no federal common law. *Id.* at 797. The reasoning of the court is somewhat suspect in light of the cases finding not only the existence of a federal common law, but also of a federal common law right to contribution.

Despite this body of authority supporting a right to contribution here, defendants argue that the Court cannot and should not find a common law right to contribution here because the monetary liability arose from a federal statute which is silent on the right to contribution. For this proposition they rely primarily on *Halcyon Lines, Inc. v. Haenn Ship Corp.*, 342 U.S. 282 (1952), and several cases involving the federal antitrust laws.[28] These cases do not

[28]Defendant unions also refer to cases pertaining to liability under the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§1901-91, and to cases such as *Carriers Insurance Exchange v. Truck Insurance Exchange,* 310 F.2d 653 (4th Cir. 1962), where it was held that there is no right to contribution among joint tortfeasors who intentionally violate the safety rules of the Interstate Commerce Commission. These cases are inapposite. As discussed later herein, that contribution does not lie for intentional wrongdoers does not mean that a right to contribution does not lie under any circumstances. Similarly the motor vehicles statute is materially different from Title VII in that, as noted in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wisc. 1976), liability under this Act is separate and individual.

compel this conclusion. In *Halcyon,* the Court declined to fashion new judicial rules of contribution because of the complex legislation involved there,[29] which legislation was materially different from that involved here. While defendants cite several cases which they claim held that there is no federal right to contribution for damages awarded under the antitrust laws, only one case, *Sabre Shipping Corporation v. American President Lines,* 298 F. Supp. 1339 (S.D.N.Y. 1969), so held.[30] This one case pertaining to the antitrust statutes is certainly not dispositive of the issues here and, in contrast to this decision, stand the numerous cases mentioned above pertaining to Title VII and the cases finding a federal common law right to contribution for damages awarded under the federal securities acts, where the statutory right to contribution did not apply, *e.g., Gould v. American-Hawaiian Steamship Co., supra.*

While these cases do not compel the conclusion that the fact that the monetary liability for which contribution is sought arose under a federal statute which is silent on contribution necessarily precludes a federal common law right to contribution here, this fact is not of no consequence. Where, as here, the monetary liability arose under such a statute, the Court should consider whether the Con-

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[29]*Id.* at 285-87.

[30]In *Baughman v. Cooper-Jarrett, Inc.,* 391 F. Supp. 671 (W.D. Pa. 1975), *rev'd on other grounds,* 530 F.2d 529 (3rd Cir. 1976), another case relied on by defendants, the court only stated in *dicta* that under federal law there is no right to contribution for *intentional* torts. *Id.* at 678 n.3. As noted, many courts deny contribution for intentional acts, and this limitation on the right to contribution does not mean that contribution does not lie under any circumstances. In *Goldlawr, Incoporated v. Shubert,* 276 F.2d 614 (3rd Cir. 1960), the court only stated, again in *dicta,* that there was strong justification for the claim that there is no right to contribution under federal law. *Id.* at 616.

gressional silence evidences a desire to deny a right of contribution and whether such a right would be consistent with the statutory framework or whether there are any other factors which counsel leaving the question of contribution to Congress. The Court has been unable to discern any indication from Title VII or its history that Congress was silent on contribution in Title VII because it meant to deny such a right. Further, a right to contribution, as discussed below, will serve to insure that the provisions of Title VII are fully enforced and is consistent with the statutory framework and the statute's underlying policies. It is also to be noted that back pay under Title VII is viewed as an equitable remedy[31] and that the court's power to award contribution initially arose from its equity jurisdiction.[32] Finally, factors such as those present in *Halcyon Lines v. Haenn Ship Corp., supra,* which counsel in favor of leaving the question of contribution to Congress are not present here.

In addition to the case law supporting Northwest's position, there are strong policy considerations favoring a rule allowing contribution. There has been much criticism of and, as this Circuit has noted, revulsion against the no contribution rule because of the inequities which result and the faulty reasoning underlying it.[33] The no contribution rule leads to an inequitable distribution of justice in that the plaintiff, through caprice or intent, can force one of two wrongdoers to bear the entire loss while the other may be

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[31]*Evans v. Sheraton Park Hotel, supra* at 186.

[32]*See, e.g., Huggins v. Graves,* 210 F. Supp. 98, 105 (E.D. Tenn. 1962), *affirmed,* 337 F.2d 486 (6th Cir. 1964); *Theobald v. Angelos,* 44 N.J. 228, 208 A.2d 129, 134 (1965); *Hobbs v. Hurling,* 117 Md. 449, 104 A. 815 (1918).

[33]*Knell v. Feltman, supra* at 666.

more or equally to blame. A rule allowing contribution would lead to a more equitable distribution of justice in that each wrongdoer would be forced to pay its fair share.[34] If, as Northwest claims, defendants caused it to discriminate, under a no contribution rule, the entire burden of a judgment of potentially $24,400,000 will fall on Northwest, while the unions will get off "scot free." Allowing contribution here will force each party to bear its fair share, and only its fair share, of the loss they have caused the *Laffey* plaintiffs. It has also been noted that the no contribution rule can lead to collusion between a plaintiff and one against whom he has a cause of action to impose the liability on another.[35]

The deterrent effects of the rules for and against contribution cannot be overlooked, particularly in light of the important national policies underlying Title VII which should not be subverted. The traditional wisdom has been that a no contribution rule will deter potential wrongdoers because they will know that they can be forced to bear the entire loss. This reasoning has been much criticized,[36] and overlooks the fact the potential wrongdoer will also know that he may well avoid any responsibility for the loss, depending upon whom the plaintiff chooses to sue. A rule allowing contribution will better serve the interests protected by Title VII and deter violations thereof. Potential violators will know that they will have to bear their share of the loss they cause an employee or prospective employee to suffer, and that their responsibility for such loss cannot be avoided simply by the plantiff's choice of a defendant. Both union and

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[34]See *Cooper Stevedoring Co., Inc. v. Kopke, Inc.*, 417 U.S. 106, 111 (1974), *Knell v. Feltman, supra* at 665.

[35]*Knell v. Feltman, supra* at 665.

[36]See *Knell v. Feltman, supra* at 666; Prosser, *supra* note 21.

employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predelictions as to whom to sue will not insure either immunity from the mandates of the law.

It is noted that a federal right to contribution for back pay awarded under Title VII, but not for monetary liability imposed under the Equal Pay Act is somewhat inconsistent in that the provisions of these statutes overlap in certain areas. This is due, however, to the statutes involved and not to the federal common law right to contribution. As noted, an essential prerequisite to contribution, where a right to contribution is recognized, is common liability. Since labor organizations and employers do not share common liability to employees under the Equal Pay Act, there can be no contribution, which is not true with Title VII. Further, to hold, as defendants urge, that because there is no right to contribution for monetary liability under the Equal Pay Act there can be none for Title VII liability, would, in effect, allow "the tail to wag the dog." While the Equal Pay Act governs only discrimination on the basis of sex in the payment of wages, Title VII pertains to many other types of discrimination in many other areas. The availability of contribution for monetary liability under the more comprehensive statute should not be governed by the availability of contribution under the more narrow statute.

Finally, defendants contend that even if there is a right to contribution, it does not apply here. They rely on the rule adopted in many jurisdictions denying contribution for intentional acts, and contend that Northwest's violations of Title VII were intentional so that it has no right to contribution here.[37] Northwest vigorously disputes de-

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[37]To support their claim that Northwest's violations were intentional, ALPA and TWU stress certain statements by this Circuit in *Laffey v. Northwest Airlines, Inc., supra.*

fendants' definition of intentional acts. The Court will not reach this question at this point. To determine whether Northwest's violations were intentional, assuming that this would bar contribution, would require this Court to look beyond the pleadings in this case which, since this case is before the Court on a motion to dismiss for failure to state a claim,[38] would not be proper. At this time, the Court holds only that there is a federal common law right to contribution for monetary liability imposed under Title VII, at least under some circumstances, and it will reach the questions as to the precise parameters of this right when the pertinent facts have been developed and properly placed before the Court.

/s/ Oliver Gasch

Judge

Date: July 7, 1977

[38]This action is also before this Court on a motion to dismiss for lack of subject matter jurisdiction, but this question does not arise in the context of that part of the motion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion to dismiss this action, plaintiff's opposition thereto, and the memoranda of points and authorities submitted by the parties, and having heard counsel for the parties at oral argument, and for the reasons set forth in the Memorandum attached hereto, it is by the Court this 7th day of July, 1977,

ORDERED that plaintiff's claim for reimbursement for some portion of its monetary liability arising under the Equal

Pay Act be, and hereby is, dismissed; and it is further

ORDERED that defendants' motion to dismiss be, and hereby is, denied in all other respects.

/s/ Oliver Gasch

Judge

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056

NORTHWEST AIRLINES, INC.

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, APPELLANT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

No. 78-1098

NORTHWEST AIRLINES, INC.

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 78-1141

NORTHWEST AIRLINES, INC., APPELLANT

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action No. 75-0223)

Argued January 24, 1979

Decided August 30, 1979

Stephen B. Moldof with whom *Robert S. Savelson* and *Donald J. Capuano* were on the brief, for appellant/cross-appellee, Air Line Pilots Association, International.

Asher Schwartz, for appellant/cross-appellee, Transport Workers Union of America.

Henry Halladay with whom *David A. Ranheim, Robert Bayer* and *Philip A. Lacovara* were on the brief, for appellee/cross-appellant, Northwest Airlines, Inc.

Vella M. Fink, Attorney, Equal Employment Opportunity Commission, with whom *Charles L. Reischel*, Assistant General Counsel, Equal Employment Opportunity Commission, was on the brief for Amicus Curiae urging dismissal.

Also *William R. Hayden* entered an appearance for Air Line Pilots Association, International in No. 78-1056.

Before WRIGHT, *Chief Judge*, and ROBINSON, *Circuit Judge*, and RICHEY,* *District Judge*.

Opinion for the Court filed by *Judge* RICHEY.

RICHEY, *District Judge*: In this case, we are called upon to determine whether an employer who violates both the Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964 possesses, under either law, a right of contribution from a union which allegedly participated in the wrong. We affirm the district court's ruling that no such right exists under the Equal Pay Act, but with respect to the title VII issue, we remand for further proceedings necessary to determine the suitability of the plaintiff's claim. Before reviewing the issues raised by this appeal, we briefly examine the background of this litigation.

I. BACKGROUND

The origin of Northwest Airlines' (the Airlines) suit against the Air Line Pilots Association, International (ALPA) and the Transport Workers Union of America (TWU) lies in a previous action instituted by Mary P. Laffey. Ms. Laffey, representing a class comprising all Northwest Airlines female cabin attendants, successfully sued her employer, the Airlines, on the grounds that it had violated both the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1082 (D.D.C. 1974), *aff'd in part and vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

U.S. 1086 (1978). After the entry of the district court's judgment in favor of Ms. Laffey's class, the Airlines moved to amend its answer to assert a crossclaim for contribution or indemnification from the ALPA. Although the ALPA had appeared in the *Laffey* trial as a non-aligned party, it never actively participated in the proceedings. The Airlines also moved to assert a third-party complaint against the TWU, the original certified bargaining representative of the plaintiff class until the ALPA assumed representation in the middle of the suit. The Airlines' motions, both filed almost one and a half years after the completion of the *Laffey* trial, were denied by the district court. This Court affirmed that ruling as within the sound discretion of the trial court. 567 F.2d at 476-78.

After the district court denied the two motions, the Airlines filed a separate suit against the TWU and the ALPA. It sought "a declaration and adjudication that TWU and ALPA are also liable, in turn and respectively, by virtue of their participation in the negotiation, execution and implementation of the collective bargaining contracts which provided for discrimination. . . ." Complaint ¶ 11, C.A. No. 75-0223 (D.D.C. filed Feb. 18, 1975). Specifically, the Airlines sought a declaratory judgment holding the unions liable for the violations of the Equal Pay Act and title VII originating in the collective bargaining agreements which they had helped negotiate. In due course, the unions moved to dismiss the Airlines' complaint for failure to state a claim and for lack of subject matter jurisdiction.

Ruling on this motion, the district court declared invalid the Airlines' claim under the Equal Pay Act, but upheld the claim under title VII. With respect to the Equal Pay Act claim, the court followed a line of precedent refusing to imply a cause of action for contribution or indemnification; the district court held that the cause

of action sought by the Airlines was inconsistent with the intended purpose of the law. Yet, the court found that the implication of a cause of action for contribution was consistent with the underlying purpose of title VII. It also held that subject matter jurisdiction for such a claim existed under 28 U.S.C. § 1331, because the Airlines was asserting a federal common law right. Relying on this conclusion, the court noted that the Airlines' lack of compliance with section 2000e-5(e) of title 42, U.S. Code, was not a bar. This provision requires an aggrieved party to file a complaint with the Equal Employment Opportunity Commission (EEOC) before commencing suit in the federal courts. In sum, the district court found that the Airlines was bringing a suit, not under title VII, but under federal common law. The court, however, qualified its conclusions regarding the plaintiff's right of contribution:

> At this time, the Court holds only that there is a federal common law right to contribution for monetary liability imposed under title VII, at least under some circumstances, and it will reach the question as to the precise parameters of this right when the pertinent facts have been developed and properly placed before the Court.

Memorandum Opinion, slip op. at 17, C.A. No. 75-0223 (D.D.C. July 7, 1977).

The district court later amended its order to include a certification for interlocutory appeal under 28 U.S.C. § 1292(b). By order of January 6, 1978, this Court granted the parties' petitions for leave to appeal. Shortly thereafter, the district court, under Fed. R. Civ. P. 54(b), entered a final judgment dismissing the Airlines' claim for reimbursement under the Equal Pay Act. Order, C.A. No. 75-0223 (D.D.C. Jan. 11, 1978).

We are thus presented with the question of Northwest Airlines' right to contribution under 29 U.S.C. § 206 (d) (1) and 42 U.S.C. § 2000e-2(a).

II. The Airlines Has No Right To Contribution Under the Equal Pay Act

We affirm the district court's conclusion regarding contribution under the Equal Pay Act, because we find such a right inconsistent with both the statute's language and purpose.

The Equal Pay Act ("the Act") proscribes discrimination in wages on the basis of sex where substantially similar work is performed. In the statute's express terms, no right of contribution is mentioned, nor is there any provision for monetary liability on the part of unions, for the benefit of employees. Yet, the Act's bar extends, in two distinct statutory subsections, to both employers and unions alike:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

29 U.S.C. §§ 206(d)(1) & (2) (1976). The Act provides for suits by aggrieved employees, but, by its express terms, it only allows such suits against employers:

> *Any employer* who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against *any employer* (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . .

29 U.S.C. § 216(b) (1976) (emphasis added). *See Tuma v. American Can Co.*, 367 F. Supp. 1178, 1181-82 (D.N.J. 1973). Unions, however, are not insulated from all redress under the Act. Section 216(c) of title 29, U.S. Code, empowers the Secretary of Labor "to supervise the payment of . . . wages . . . owing to any employee or employees under section 206 or section 209 of this title." This power certainly includes the authority to seek redress against unions which violate the Act.[1] *E.g., Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). The relevant statutes thus do not expressly create either a cause of action against unions for the benefit of employees, or one for contribution for the benefit of employers. Accordingly, we must determine whether, under the circumstances of

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[1] Pursuant to Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807, *reprinted in* 5 U.S.C.A. app. II (1979 Supp.), the Secretary of Labor's enforcement powers over the Equal Pay Act were transferred to the Equal Employment Opportunity Commission.

this case, it would be appropriate to imply the cause of action which the Airlines has asserted.

In determining whether to imply a cause of action for contribution, we must seek guidance from the familiar test developed in *Cort v. Ash*, 422 U.S. 66 (175). Although the *Cort* standard is more commonly applied to assess the validity of implying a *plaintiff's* cause of action, it has full relevance to the present situation, involving a defendant turned third-party plaintiff. The *Cort* standard basically provides insight into the legislative intent behind the statute at issue and thereby offers guidance, regardless of the differing postures of the parties who may benefit from implication. The standard requires this Court to weigh four factors: 1) whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted; 2) whether there is any indication of legislative intent to create or deny a remedy; 3) whether it is consistent with the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a federal cause of action. 422 U.S. at 78.

Although the district court also applied the *Cort* test, its analysis incorrectly focused upon whether the employer, Northwest Airlines, was a party for whose special benefit the Equal Pay Act was enacted. Those who seek contribution must have been, at one time, defendants and almost by definition, defendants are excluded from the class envisioned in the first prong of the *Cort* test. Thus, under the district court's analysis, any defendant who seeks to become a third-party plaintiff will almost always be denied an implied right of contribution. Significantly, apart from *Cort*, plaintiff's position—not that of the defendant or third-party plaintiff—vis-a-vis the third-party defendant will generally determine the existence of a right of contribution: if the plaintiff could hold either

of two defendants liable, a right of contribution will be recognized; if, on the other hand, one of the defendants is protected from suit by the plaintiff, it will also be protected from contribution. Prosser, *Handbook of the Law of Torts* § 50, at 309 (4th ed. 1971). Accordingly, in order to determine whether an employer may seek contribution from a union, we must also consider whether an employee could bring suit against a union. Here, this approach provides insight into the legislative scheme. In order to avoid the confusing results which flow from the district court's application of the *Cort* test, we find it more realistic, under *Cort*, to regard the employees as the benefitting class and to regard the union as being held liable to them. Under this approach, the first prong of the *Cort* test is easily satisfied. The employees are clearly the class especially intended to be protected under the Equal Pay Act.

The Airlines' claim, however, fails to satisfy the third prong of the *Cort* test—consistency with the legislative scheme. It is improbable that an employee would ever have an implied cause of action under the Equal Pay Act against his union. The statutory scheme envisions three modes of enforcement and to imply a fourth would be inconsistent with the intent evidenced by the existing three. First, under section 216(a) of title 29, U.S. Code, "any person" who wilfully violates the Act may be subject to criminal penalties. Under section 216(c), the Secretary of Labor may bring suit to recover money owing "to any employee or employees." [2] Finally, section 216(b) of title 29 permits suits by employees against "any employer" who violates the Act. The statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by employees. This statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union,

[2] See note 1 *supra*.

once that employer had been found liable to its employees. Of course, we need not—and do not—definitely resolve the issue of an employee's right to sue a union under the Act. We hold only that the likelihood of the implication of such a right is sufficiently remote to preclude the creation of a cause of action against a union for contribution or indemnification. Such a cause of action would, in reality, create liability on the part of the union for the benefit of employees whom Congress did not intend to protect in such a manner.

The stated purpose of the Equal Pay Act is also instructive on the issue of implication. The Act's declaration of purpose states that "wage differentials based on sex . . . [constitute] an unfair method of competition." Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a)(5), 77 Stat. 56; *see* 29 U.S.C. § 202(a)(3) (1976). By declaring these differentials illegal, the Act attempts to regulate competition between various business concerns. Certainly, the parties most appropriately subject to this regulation would be employers, not unions. The Act's focus on unfair competition explains the existence of a greater battery of deterrents against employer-violators than against unions who participate in the breach. The Airlines submits that this analysis has no relevance in the present case because its conflict typified an industry-wide practice. As a result, the Airlines concludes, the business practices at issue could never be the source of an unfair competitive advantage. The air travel industry, however, is certainly in competition with other methods of transportation and the illegal wage differential may well have provided some advantage over firms offering other means of travel. Thus, this Court's decision not to imply a cause of action for contribution or indemnification against a union is fully consistent with the purpose and scope of the Equal Pay Act.

Our conclusion is also in accord with a persuasive and well-reasoned line of precedent. In *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977), the Third Circuit decided:

> As noted *supra*, the Equal Pay Act specifically provides for a cause of action against an employer for back wages. The act evidences absolutely no Congressional intent to make a union liable either to an employee or to an employer. We recognize the fact that an act need not specifically provide for a cause of action in order for it to provide the basis for recovery. *See, e.g., Cort v. Ash*, 422 U.S. 66, 75, 95 S. Ct. 2080, 45 L.Ed. 2d 26 (1975). However, we find none of the relevant criteria suggested in *Cort* present which would allow a cause to be implied under the Equal Pay Act against a union.

Reviewing the same contribution issue, *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975), also concluded "[T]here seems no need to supplement the statute with an additional remedy which Congress did not see fit to provide." [3] Plaintiff's reliance on *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), as being to the contrary is mistaken. In *Hodgson*, not only was the plaintiff the Secretary of Labor, but the Secretary himself had named both an employer and a union as defendants. Although the court held that the Secretary was entitled to recover money damages from the union, 326 F. Supp. at 373, it did not even address the issue of employer-union contribution. *Hodgson* thus is fully distinguishable from the present case and our ruling here is not the least bit inconsistent with that decision.

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[3] *Accord*, Cook v. Mountain States Tel. & Tel. Co., 397 F. Supp. 1217, 1226 (D. Ariz. 1975); Tuma v. American Can Co., 367 F. Supp. 1178 (D. N.J. 1973); Wirtz v. Hayes Indus., Inc., 58 Lab. Cas (CCH) ¶ 32,085 (N.D. Ohio 1968).

Based on the foregoing, we conclude that an employer's right of contribution or indemnification against a union is inconsistent with the scheme and purpose of the Equal Pay Act. Accordingly, on this point, we affirm the district court's dismissal of Northwest Airlines' claim.

III. The Plaintiff's Title VII Claim is Remanded For a Determination on the Issue of Laches

Although the district court found that contribution was appropriate under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), we decline to affirm that holding at this juncture. On appeal, the defendant unions have raised, for the first time, the argument that the Airlines' claim is barred by laches. Of course, we make no ruling regarding the merits of this contention. We only decline to resolve a complex and sensitive question when the claim which forms the basis of the appeal may suffer from some other defect. This approach is especially appropriate here, because the parties have relied on title VII's goal of prompt, administrative review in arguing for, or against, the existence of a right of contribution. For example, the unions contend that the acknowledgment of any right of contribution or indemnification would be inconsistent with this statutory goal. The Equal Employment Opportunity Commission, as amicus curiae, has argued that contribution is appropriate under title VII, but only if the defendant's claim is brought promptly in the original suit by the aggrieved employee. Thus, timeliness may well be an important consideration in evaluating the propriety of a cause of action for contribution;[4] conceivably, untimeliness, and

[4] We note that for a variety of reasons, timeliness is a less relevant consideration to the review of plaintiff's claim under the Equal Pay Act. First, that claim is before the court as a final judgment pursuant to Fed. R. Civ. P. 54(b), not an interlocutory appeal under 28 U.S.C. § 1292(b). More importantly, the absence of an administrative review process,

the injustice resulting therefrom, could interfere with the Court's assessment of the general validity of contribution under title VII. Hard cases may make bad law, but unnecessary hard cases should not make any law at all.

Accordingly, we remand that portion of the district court's order which grants the plaintiff a right of contribution or indemnification under title VII and instruct the trial court to make a determination on the laches question. If the trial court finds that laches is not a bar, the defendants' appeal may be renewed.

IV. Conclusion

Although we apply a slightly different analysis, we affirm the district court's holding that, under the Equal Pay Act, no right of contribution or indemnification exists in favor of the plaintiff, Northwest Airlines. With respect to the remainder of the district court's order, we remand for a determination on the laches question.

Judgment Accordingly.

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designed to expedite the resolution of claims, renders the statutory scheme of the Equal Pay Act vitally different from that of title VII. Finally, we note that in their arguments concerning the Equal Pay Act claim, none of the parties has raised any issue with respect to laches.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc. D.C. Civil No. 75-0223

v.

Transport Workers Union of America, AFL-CIO, United States Court of Appeals
Appellant for the District of Columbia Circuit

Air Line Pilots Association, International FILED AUG 30, 1979

No. 78-1098

Northwest Airlines, Inc. GEORGE A. FISHER
CLERK

v.

Transport Workers Union of America, AFL-CIO

Air Line Pilots Association, International,
Appellant

No. 78-1141

Northwest Airlines, Inc.,
Appellant

v.

Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, Chief Judge, and ROBINSON, Circuit Judge, and RICHEY,* District Judge

ORDER

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is affirmed in part, in accordance with opinion of this Court filed herein this date, and it is

FURTHER ORDERED AND ADJUDGED, by this Court, with respect to that portion of the case which is not the subject of the foregoing affirmance, that the record is remanded to the District Court for further proceedings, also in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Date: August 30, 1979

Opinion for the Court filed by District Judge Richey.

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a).

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc.

v.

Transport Workers Union of America, AFL-CIO,

Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 5 1979

GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 78-1098 and 78-1141

BEFORE: Wright, Chief Judge; Robinson, Circuit Judge; and Richey*, Judge, United States District Court for the District of Columbia

ORDER

IT IS ORDERED, by the Court, *sua sponte,* that the order entered in these consolidated appeals, on August 30, 1979, be, and it is hereby, vacated.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

APPENDIX G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc. D.C. Civil No. 75-0223

v.

Transport Workers Union of America, AFL-CIO, United States Court of Appeals
Appellant for the District of Columbia Circuit

Air Line Pilots Association, International FILED OCT. 5, 1979

No. 78-1098

Northwest Airlines, Inc. GEORGE A. FISHER
CLERK

v.

Transport Workers Union of America, AFL-CIO

Air Line Pilots Association, International,
Appellant

No. 78-1141

Northwest Airlines, Inc.,
Appellant

v.

Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, Chief Judge, and ROBINSON, Circuit Judge, and RICHEY,* District Judge

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes, insofar as it pertains to the Equal Pay Act, is affirmed, but said judgment, to the extent that it relates to the Title VII claim, is vacated in order that the District Court may consider the issue of laches, and this case is remanded to the District Court for further proceedings, all in accordance with the opinion of this Court filed herein on August 30, 1979.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Date: October 5, 1979

Opinion for the Court filed by District Judge Richey.

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a).

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc.

v.

Transport Workers Union of America, AFL-CIO,
Appellant

Air Line Pilots Association, International

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 9 1979

GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 78-1098 and 78-1141

BEFORE: Wright, Chief Judge; Robinson, Circuit Judge; and Richey*, Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of appellee's (Northwest Airlines, Inc.) petition for rehearing, it is

ORDERED, by the Court, that appellee's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).